86-222

Supreme Court, U.S.
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NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

****

John Batterton, W. Stephen Minick,
Linda D. Rapavi, and G. Stephen Stubbs,

Petitioners

v.

Texas General Land Office
and Garry Mauro,

Respondents

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

****

BUNTON, NOLAN, ODÉ & COOPER
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Austin, Texas 78701

Connie Odé
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Margaret A. Cooper
Counsel for Petitioners

58 pp

QUESTIONS PRESENTED

In this employment termination suit, were Petitioners wrongfully denied their day in court because the lower court applied incorrect standards of summary judgment proof in (1) concluding that there was no question of fact sufficient to preclude a summary judgment on the issue of Petitioners' property interest in continued employment with the Texas General Land Office, and (2) affirming the trial court's dismissal of Petitioners' First Amendment claims, when those claims were not addressed by the cross-motions for summary judgment?

LIST OF ALL PARTIES IN COURT BELOW

The parties to the proceeding below were:

1. John Batterton;

2. W. Stephen Minick;

3. Linda D. Rapavi;

4. G. Stephen Stubbs;

5. The Texas General Land Office; and

6. Garry Mauro, Commissioner of the Texas General Land Office.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of All Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	v
Jurisdictional Statement	v
Statute Involved	vi
Statement of Case	2
Argument	6
Conclusion	22
Certificate of Service	23
Appendix	24

TABLE OF AUTHORITIES

Cases — Page

Adickes v. Kress & Co.,
398 U.S. 144 (1970) 13, 20

Batterton v. Texas General
Land Office, 789 F.2d 316
(5th Cir. 1986) 8

Boeing Co. v. Shipman,
411 F.2d 365 (5th Cir. 1969) 12

First Nat'l Bank v. Cities Service Co.,
391 U.S. 253 (1968) 13

Hargrave v. Fibreboard Co.,
710 F.2d 1154 (5th Cir. 1983) 14, 19, 21

Richoux v. Armstrong Cork Corp.,
777 F.2d 196 (5th Cir. 1985) 12

Williams v. Shell Oil Co.,
677 F.2d 506 (5th Cir.),
cert. denied, 459 U.S. 1087 (1982) ..11

Statutes

TEX. NAT. RES. CODE ANN. §31.020
(Vernon 1968) .....vi, 7

TABLE OF AUTHORITIES
CONTINUED

Miscellaneous — Page

Rule 12, Federal Rules of Civil Procedure 20, 21

Rule 12(b)(6), Federal Rules of Civil Procedure 20

Rule 12(e), Federal Rules of Civil Procedure 20

Rule 15(a), Federal Rules of Civil Procedure 4

Rule 56, Federal Rules of Civil Procedure 14, 20

Rule 56(c), Federal Rules of Civil Procedure 20

Rule 56(e), Federal Rules of Civil Procedure 14, 16

OPINIONS BELOW

The opinion of the trial court, the United States District Court for the Western District of Texas, Austin Division (Nowlin, D.J.), is reported at 593 F. Supp. 372 (W.D. Tex. 1984), and is reprinted in the appendix hereto.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 783 F.2d 1220 and is reprinted in the appendix hereto.

The opinion of the Court of Appeals for the Fifth Circuit denying the petition for rehearing is reported at 789 F.2d 316 and is reprinted in the appendix hereto.

JURISDICTIONAL STATEMENT

The opinion of the Fifth Circuit Court of Appeals was filed on March 3, 1986. Petitioners' Petition for Rehearing was denied by an opinion filed on May 12, 1986.

This Court has jurisdiction to review, by writ of certiorari, the judgment of the court below pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

TEX. NAT. RES. CODE ANN. §31.020 (Vernon 1968):

§31.020 Conditions of Employment

(a) ...

(b) Clerks and employees of the land office shall hold their offices and positions at the pleasure of the commissioner and may be removed by him at any time for satisfactory cause.

STATEMENT OF CASE

This is a civil rights action commenced on July 15, 1983, to vindicate Petitioners' termination from employment by the Texas General Land Office on or about May 13, 1983. Contending that they had a reasonable expection of continued employment so long as they satisfactorily performed their duties, Petitioners sought damages, permanent injunctive relief and recovery of their costs and attorney's fees pursuant to 42 U.S.C. §§1983 and 1988. Petitioners alleged that each had satisfactorily completed the six-month probationary period of employment and that each was considered by his or her superior to be an outstanding employee as reflected in annual performance evaluations.

Respondents answered, contending that Petitioners' terminations were the result of a reorganization within the General Land Office and that Respondent Garry Mauro, Commissioner of the General Land Office, enjoyed a qualified immunity from Petitioners' claims.

On July 11, 1984, pursuant to an agreement of counsel, both sides submitted motions for summary judgment. Petitioners sought summary judgment only on the issue of whether Petitioners had a property interest in their public employment. Respondents sought summary judgment on the following issues: (1) whether Petitioners had a property interest in their public employment; (2) whether the Texas General Land Office is immune from liability under the doctrine of sovereign immunity; (3) whether the doctrine of sovereign immunity bars the recovery of compensatory and punitive damages against Respondent Mauro in his official capacity; and (4) whether good-faith immunity protects Respondent Mauro from an award of compensatory and/or punitive damages and/or attorneys fees against him in his individual capacity. Both motions were followed by numerous responses and replies, Petitioners asserting practices and procedures within the General Land Office consistent with

a property interest, and Respondents denying that such practices and procedures ever existed.

At the same time, on July 11, 1984, Respondents filed a Consent to Amend Pleadings pursuant to Rule 15(a), Federal Rules of Civil Procedure, granting to Petitioners consent to amend their pleadings. Petitioners filed a Second Amended Complaint on July 30, 1984, alleging for the first time, in addition to claims previously raised, (a) jurisdiction pursuant to the First Amendment to the United States Constitution, (b) dismissals based on political patronage rather than a purported reorganization of the General Land Office, and (c) a claim for relief based on Respondent Mauro's violation of Petitioners' First Amendment rights. Respondents did not file a responsive pleading to Petitioners' Second Amended Complaint.

On September 7, 1984, the District Court heard oral arguments on the cross motions for summary judgment and signed an order in regard

thereto on September 17, 1984. The court's order denied Petitioners' motion for summary judgment and granted Respondents' motion for summary judgment, on the basis of the court's conclusion that Petitioners had no property interest in their employment. The court's order did not reach Respondent's claims of immunity but stated specifically that it disposed of all issues in the case. On September 27, 1984, Petitioners filed a motion to alter or amend the judgment insofar as it summarily disposed of Petitioners' First Amendment claim. This motion was overruled by the court on October 10, 1984.

The Fifth Circuit Court of Appeals affirmed the trial court's judgment by an opinion filed March 3, 1986, and denied Petitioners' Petition for Rehearing by an opinion filed May 12, 1986 (Judge Alvin B. Rubin dissenting).

ARGUMENT

Petitioners request that this Court review, by writ of certiorari, the judgment of the court below because, in affirming the judgment of the trial court, the Fifth Circuit Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Specifically, Petitioners contend that they were deprived of their day in court as a result of two errors by the court below: first, it erroneously concluded that Respondents were entitled to a summary judgment on the issue of Petitioners' property interest; and, secondly, it erroneously concluded that, although never addressed by the cross-motions for summary judgment, Petitioners' First Amendment claims were waived as a result of defense counsel's unanswered assertion that "this disposes of the entire case." Under generally accepted standards of summary judgment proof,

Petitioners were entitled to a trial on the merits on these issues. The lower court's ruling raises serious questions concerning the standard of summary judgment proof in any case and about the accessibility of the courts to litigants in all cases.

The Property Interest Issue

Both the trial court and the Fifth Circuit concluded that TEX. NAT. RES. CODE ANN. §31.020 (Vernon 1968) is ambiguous. Both courts also concluded, therefore, that previous administrative construction of the statute is determinative -- if previous administrative construction supported practices and procedures consistent with a property interest, the legislative intended to create such an interest when it codified the law in 1977; if previous administrative construction denied the existence of practices and procedures consistent with a property interest, the legislature did not intend to create a property interest in 1977.

Ignoring the fact that "unspoken legislative ratifications are a risky means of determining legislative intent" in the first place, Batterton v. Texas General Land Office, 789 F.2d 316, 318 (5th Cir. 1986) (Rubin dissenting), Petitioners contend that the evidence surrounding previous administrative construction of the statute was disputed and that, therefore, the issue of a property interest should not have been resolved by a motion for summary judgment. In granting Respondents' motion on this issue, the lower court has fashioned a new level of summary judgment proof that threatens to deny all summary judgment litigants their day in court.

As part of their summary judgment evidence, Respondents submitted an affidavit of Jack Giberson, who served as Chief Clerk in the Land Office during the period 1960 to 1983. Mr. Giberson stated that all commissioners under whom he served consistently and uniformly interpreted §31.020 as granting to the commissioner the right and

power to terminate any employee for any reason. He explained at length the policies and procedures implemented and followed by Bob Armstrong. Bob Armstrong served as commissioner of the Land Office from 1971 to 1983. Mr. Giberson did not indicate that there was a change in overall policy at any time during Commissioner Armstrong's tenure.

Petitioners addressed the same policies and procedures in their affidavits, having served under Commissioner Armstrong from approximately 1977 to 1983. They reached conclusions, however, entirely different from those reached by Mr. Giberson. While Mr. Giberson wrote:

> [A]ll commissioners under whom I served consistently and uniformly interpreted Section 31.020 NRC ... as granting to the commissioner the right and power to terminate any employee for any reason which satisfies the commissioner...
>
> Commissioner Armstrong established a grievance committee in 1974 ... This grievance committee was primarily established to insure that certain employees would not be discriminated against on the basis of race, religion, sex or national origin in

> compliance with the Civil Rights Act of 1965; however, it was administratively expedient to allow any other employee's grievance to be handled by the committee. Commissioner Armstrong used this committee as a fact finder and reporter, but he never delegated nor waived his statutory discretion concerning employment practices or policies, nor did he ever intend to establish a contractual right in employment at the Land Office by implementing this fact finding procedure.

Petitioner Minick explained:

> While employed with the Texas General Land Office, I supervised several employees in the Land Resources Division. The policies and practices of the General Land Office during my tenure required that in order to terminate the employment of persons in the General Land Office, adequate documentation and support that good cause existed for the termination from employment of an individual had to be demonstrated. Employees could not be summarily dismissed without notice of reasons for a proposed adverse employment decision and an opportunity to correct any deficiencies in performance. That had been the policy and practice of the General Land Office since the inception of my employment there on November 1, 1977.

Similar testimony was submitted by the other Petitioners, in both affidavit form and by deposition testimony.

It is undeniable that not both Respondents' affidavit and Petitioners' affidavit can be true. How, then, could the lower court, or can this Court, deny that the following factual issues must still be answered:

(1) What were the practices in the Land Office after 1977 when the terminations in question took place?

(2) If Respondent Giberson was correct in saying that the practices were uniform before and after 1977, did Petitioners' affidavit refute his version of the pre-1977 interpretation?

(3) Did the Commissioner change his interpretation of the statute after 1977?

In summary judgment proceedings, any doubt as to the existence of a fact issue must be resolved against the movant, Williams v. Shell Oil Co., 677 F.2d 506 (5th Cir.), cert.

denied, 459 U.S. 1087 (1982), unless "the facts and inferences point so strongly and overwhelmingly in [its] favor that the Court believes that reasonable men could not arrive at a contrary verdict." Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc). In Richoux v. Armstrong Cork Corp., 777 F.2d 296 (5th Cir. 1985), the Fifth Circuit reversed a summary judgment based on an inference much more tenuous than that shown in this case. Judge Rubin explained as follows:

> The summary judgment was granted on the basis of the plaintiff's failure to establish causation. Although she introduced no direct evidence that Southern Textile's products had a role in causing Richoux's injury, there was evidence from which causation could have been inferred. Southern Textile Corp. (formerly Southern Asbestos Co.) was incorporated in 1974. In 1985, Southern sold asbestos cloth to Marquette Insulation. That same year, Marquette Insulation sold asbestos cloth and other products containing asbestos to Dixie Machine Welding and Metal Work, Inc. The plaintiff alleges that "Mr. Richoux worked in various capacities during the years 1944 through 1975 for Dixie Machine Welding and Metal Works, Inc. ... whose business involved the maintenance and repair of ships."

> Southern Textile does not dispute this. Drawing the inferences most favorable to the plaintiff from those facts, a fact finder might infer that asbestos manufactured by Southern and sold to Marquette and then through Marquette to Dixie was present in Defendent's place of employment in 1975.

Id. at 297 (footnotes omitted). He continued:

> That a jury might well have declined to draw this inference is of no moment ... the plaintiff was not required to "establish" anything, she had merely to produce evidence sufficient to raise a disputed issue as to a material fact.

Id. Until this proceeding, this standard has been universally followed by all circuits including the Fifth. It is a standard that has been reiterated by this Court on numerous occasions. See First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-89 (1968), and Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970).

This Court is asked to determine, not whether Petitioners were wrongfully terminated, but whether Petitioners can be denied their day in court on the basis of a

new level of summary judgment proof. This departure from the accepted and usual course of judicial proceedings by the lower court calls for an exercise of this Court's power of supervision.

The First Amendment Claim

Petitioners contend that the Court of Appeals also erred in affirming the trial court's dismissal of Petitioners' First Amendment claim, again because it applied a standard of proof and proceeding inconsistent with that generally accepted in summary judgment disputes. By granting summary judgment on an issue addressed neither by Petitioners' or Respondents' motion nor in oral argument, the trial and appellate courts effectively rewrote Rule 56, Federal Rules of Civil Procedure, to require a party to come forward with all its evidence, whether or not relevant to the issues in question. Clearly, such a burden is contemplated by neither the language of Rule 56(e) nor the Hargrave decision relied upon by the Fifth Circuit.

The lower court concluded that Petitioners waived their First Amendment claim because of their failure to respond to Respondents' assertion that a ruling in Respondents' favor would dispose of the entire case, made first in Respondents' motion for summary judgment (filed July 11, 1984, prior to the amendment of Petitioner's complaint adding the First Amendment claim on July 30, 1984) and later during oral arguments on that motion. In addressing allegations concerning Petitioners' termination, the Fifth Circuit wrote:

> [W]hile the appellees never referred to the [First Amendment] claim explicitly, some of their evidence rebuts the claim. Appellee Mauro asserted in both a deposition and an affidavit that the dismissals stemmed from his honest effort to streamline the GLO, and his statements are bolstered by the affidavits of non-party officials of the GLO and by other documentation. The employees, on the other hand, failed to support their claim except with the following bald and conclusory assertion:
>
> > [T]he purported reorganization of the General Land Office was in fact a pretext afterthought to justify dismissals in order that Garry Mauro might extend political patronage to friends and supporters by removing existing career employees from

> the General Land Office in order to free budget funds to pay substantial salaries for those persons he wished to install in positions in the Land Office.

It determined, therefore, because some evidence touching upon Petitioners' First Amendment claim had been submitted in conjunction with the other issues, that Petitioners were required to come forward with all their evidence in that regard and create a fact issue.

Petitioners contend that this result is absurd. To begin with, even were they required to come forward with evidence in support of their First Amendment claim, the facts as submitted already reflect a dispute sufficient to justify a trial on the issue. Secondly, Rule 56(e) has never required a party to come forward with evidence on a claim that has not been first properly proven by the movant under Rule 56(c).

Contrary to the Fifth Circuit's position, each of Petitioners' affidavits disputed at length Respondents' assertions of a purported

reorganization of the General Land Office, and each stated in detail the reasons behind Petitioners' belief that much reorganization was merely a pretext for extending political patronage to friends and supporters.

In addition to the "bald and conclusory assertion" detailed by the Fifth Circuit, the affidavit of Petitioner John Batterton explained:

> I was told by Commissioner Garry Mauro that my employment was terminated because he desired to employ someone with new management skills. He did not define that term nor did he inform me in what manner I lacked such new management skills. In fact, I had been ranked by my supervisor first among six professional staff members in the Uplands Division of the Land Resources Program. Employees were ranked based on evaluation factors such as attendance, dependability, initiative, quality and quantity of work, task development and performance, and overall professionalism. In addition, in my most recent performance evaluation, covering the period from June, 1981, to May, 1982, my supervisor, Mike Hightower, noted that I had shown initiative in new management areas.
>
> I was not ever notified that my performance was in any way unsatisfactory or deficient in any respect. I was given no warning that my employment was in jeopardy if I failed to correct some aspect of my job performance.

* * *

> Although reorganization was stated to justify my termination from employment, no clear plan of reorganization existed at the time of my termination from employment on May 31, 1983. In response to Plaintiffs' motion for production of the reorganization plan in effect on the date of my termination, Defendants produced only two instruments (attached hereto as Exhibits A and B; see Mauro Deposition at pp. 19-23, attached hereto as Exhibit C), both dated subsequent to the date of my termination from employment. Indeed, the purported reorganization of the General Land Office was in fact a pretextual afterthought to justify dismissals in order that Garry Mauro might extend political patronage to friends and supporters by removing existing career employees from the General Land Office in order to free budget funds to pay substantial salaries for those persons he wished to install in positions in the Land Office. The charts showing the assimilation or elimination of various job duties appended as exhibits to the affidavit of Jack Giberson appear to have been prepared to justify actions based on patronage after Defendants learned that Plaintiffs contemplated litigation to contest their termination from employment.

Similar evidence was submitted by the other Petitioners, again both in affidavit form and by deposition testimony.

This evidence alone distinguishes Hargrave v. Fibreboard Co., 710 F.2d 1154 (5th Cir. 1983), wherein the court found that Nicolet, the non-movant, failed to set forth any facts in support of its claims. Id. at 1163-64.

Hargrave is distinguishable for the further reason that the record in that case revealed that the claims in question were in fact addressed during oral argument. Nicolet, nonetheless, failed to mention a single fact at any point that triggered a genuine issue on those claims.

In the present case, Petitioners' First Amendment claim was not addressed during oral argument, nor was it made the subject of Respondents' motion for summary judgment. It is inconceivable, therefore, that a simple assertion by counsel that a favorable ruling "disposes of the entire case" is sufficient to justify summary dismissal of a well pleaded claim. If Respondents had a complaint with respect to the sufficiency of Petitioners'

claim, their redress was a Rule 12(e) motion for a more definite statement or a Rule 12(b)(6) motion to dismiss. Rule 12, Federal Rules of Civil Procedure. They had, after all, expressly consented to the filing of amended pleadings after the filing of their motion for summary judgment.

Nothing in Rule 56, Federal Rules of Civil Procedure, requires a party to come forward with evidence in support of claims not made the basis of a motion for summary judgment. As pointed out by this Court in Adickes v. Kress & Co., 398 U.S. 144 (1970):

> [B]oth the commentary on and background of the 1963 amendment [to Rule 56(e)] conclusively show that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. The Advisory Committee note on the amendment states that the changes were not designed to "affect the ordinary standards applicable to the summary judgment" ... "where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.

Id. at 159-60 (footnotes omitted).

The appellant in Hargrave was struck down because at no point did it mention a single fact that triggered a genuine issue on its theories of recovery; it failed to do so even in its motion for reconsideration and even though those theories had been squarely addressed. By contrast, Petitioners herein addressed the issue in their summary judgment affidavits as well as in a motion for reconsideration, even though the issue was mentioned in neither Respondents' motion for summary judgment nor their oral argument.

Disposition of Petitioners' First Amendment claim is proper, therefore, pursuant only to a Rule 12 motion, a motion for summary judgment addressed directly to the issue, or a trial on the merits. Due process demands nothing less.

CONCLUSION

Because the Fifth Circuit Court of Appeals has fashioned new levels of summary judgment proof that wrongfully denied Petitioners their day in court, this petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed by certified mail, return receipt requested, No. P 063 197 020, to F. Scott McCown, Asst. Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78701, on this ____ day of August, 1986.

Connie Odé

APPENDIX

1. Judgment of the trial court.

2. Opinion of the Fifth Circuit Court of Appeals.

3. Opinion of the Fifth Circuit Court of Appeals denying Appellants' Petition for Rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOHN BATTERSON, W. STEPHEN MINICK, LINDA D. RAPAVI, and G. STEPHEN STUBBS, Plaintiffs	§	
VS.	§	CIVIL NO. A-83-CA-361
THE TEXAS GENERAL LAND OFFICE AND GARRY MAURO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE GENERAL LAND OFFICE, Defendants	§	

ORDER

Came on for consideration the cross-motions of the parties for summary judgment and partial summary judgment. Both sides thoroughly briefed the issues for the Court and a hearing on these motions was held on September 7, 1984. The main thrust of the Plaintiff's claim is that they were unconstitutionally deprived of property, by an official agency of the State of Texas, and they now seek redress under 42 U.S.C. §§ 1983

and 1988 for this alleged Fourteenth Amendment violation. The Plaintiffs also allege, in their Second Amended Complaint, under the subtitle "Jurisdiction and Venue," that Defendants violated the First Amendment rights of Plaintiffs. Beyond this mere assertion in this one part of the pleadings, the Court has had no specific facts, evidence or argument submitted to the Court. Rule 56(e) of the Federal Rules of Civil Procedure provides in pertinent part that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Plaintiffs made no argument at the summary judgment hearing despite Defendant's assertion that if the Court decided the Summary Judgment Motion in

Defendant's favor, it would dispose of the entire case. Furthermore, Plaintiffs made no specific factual allegations as to how their First Amendment rights were violated.

The Court finds persuasive Defendant's argument that the issue of whether Plaintiffs possessed a property interest in their job is controlling. The Court, paying particular attention to the mandate of Wells v. Hico Independent School District, 736 F.2d 243 (5th Cir. 1984) and to Murray v. Harris, 112 S.W.2d 1091 (Tex. Civ. App. - Amarillo 1938, writ dism'd) believes no such property interest accrued to the Plaintiffs.

Plaintiffs were public employees. They claim violation of their rights to their constitutionally protected "property interest" in their jobs. It is beyond dispute that whether a property interest exists must be determined by state law; state law creates and defines property interests. Hico, 736 F.2d at 252 (citing Bishop v. Wood, 426 U.S. 341, 344

(1976) and Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982)). A property interest is created when state law secures a right or entitlement. Board of Regents v. Roth, 408 U.S. 564, at 577 (1972). Plaintiffs claim that in this case, state law provides a right to be fired only for "satisfactory cause" under Tex. Nat. Res. Code § 31.020 (Vernon 1968).

It is this statute that is at the center of the maelstrom. The statute was originally enacted in 1879. It provides that employees of the Land Office "shall hold their offices and positions and at the pleasure of the Commissioner and may be removed by him at any time for satisfactory cause." Obviously, the overall tenor of the language is that employees of the land office work at the pleasure of the Land Commissioner. The Court notes that "satisfactory cause" as intended by the drafters of the statute was not defined, nor is it necessarily either an objective or

subjective test. The Court believes that "satisfactory cause" was intended to mean for any reason that the Commissioner found satisfactory and appropriate. This is consistent with the other language of the statute. Even, if this Court were to place the gloss of modern construction on this phrase, then the Court must only ascertain that the dismissal was not for an illegal reason. This is the thrust of Perry v. Sindermann, 408 U.S. 593, 597 (1972), a case heavily relied on by Plaintiffs. Dismissal for the exercise of a constitutionally protected right is impermissible with or without the "satisfactory cause" language in the Texas statute. Plaintiffs have not alleged the exercise of any such rights for which they were dismissed. Thus, under either reasonable interpretation, the Defendants have not violated the State law or the United States Constitution. The Court does not believe that the Legislature intended to enact

a statute giving employees a property interest, rather the Court believes that the Legislature intended to create a pure at-will form of employment. The Court does not believe the Legislature intended to limit the power of the Land Commissioner to hire and fire employees through the use of the words "satisfactory cause." The Court finds no entitlement to employment under Texas state law, therefore there is no federal right implicated by the termination of employment.

The arguments by Defendants in support of this conclusion are highly persuasive. The common law of Texas is that employees hired, who do not have a contract for a specific period of time, serve at the pleasure of their employers. Eastline Railroad Co. v. Scott, 10 S.W. 99 (1888). The Legislature reaffirmed this position with the Position Classification Act of 1961, Tex. Rev. Civ. Stat. Ann. Art. 6252.11 § 5 (Vernon 1970).

> It is a very well-established rule that where a statute of doubtful construction has been construed by

> executive officers of the State charged with its execution, and it has subsequently been re-enacted without substantial charge of language, it will continue to receive the same construction.

Stanford v. Butler, 181 S.W.2d 269 (Tex. 1944). Important to this Court is the fact that § 31.020 has been reenacted four times since 1879 without charge. The most recent codification was in 1977. Therefore the Legislature has confirmed the Commissioner's construction of the statute.

Having read the statute carefully, the Court is convinced that, at best, the statute may be ambiguous. Certainly the statute does not clearly establish a right to public employment by these Plaintiffs or any other employees in the land resources office. The Court must follow the case law of Texas, which states that "Legislative grants of property, rights, or privileges must be construed strictly in favor of the state on grounds of public policy, and whatever is not unequivocally granted in clear and specific

terms is withheld. Any ambiguity or obscurity in the terms of the statute must operate in favor of the State." Empire Gas and Fuel Co. v. State, 47 S.W.2d 265, 272 (Tex. 1932) and State v. Standard, 414 S.W.2d 148, 153 (Tex. 1967).

The Plaintiffs place great weight on the existence of a Policy/Procedure Manual Number 73.2 as creating a property interest. The Court does not agree. Nothing in the manual procedures precludes at-will dismissal. Having carefully considered all of the arguments of Counsel, the Court is convinced that the statute § 31.020 is intended by the Texas Legislature to be an at-will statute. The Land Commissioner, even if he so chose, could not exceed his statutory authority and create a different kind of contract. State v. Ragland Clinic-Hospital, 159 S.W.2d 105 (Tex. 1942). This doctrine is thoroughly explained in Murray v. Harris, 112 S.W.2d 1091 (Tex. Civ. App. - Amarillo, 1938, writ dismissed).

Furthermore, the Plaintiffs have gone no further than to make a bold assertion that this Manual does create such a property interest, through a classification between employees who have and have not been with the Commission for more than six months as to their administrative appeal procedure. Certainly this difference is logical as an agency can decide to accord different administrative protection if it is rationally related to a legitimate state interest. This classification does not and cannot under state law create a property interest in the employees of the Land Commission.

Finally, the Defendants has centered its claim on the case of Perry v. Sindermann, 408 U.S. 593 (1972). Broadly construed, the Supreme Court recognized that a state institution, through its policies, could give rise to a state law implied contractual right based on "mutually explicit understandings." Perry, 408 U.S. at 601. The Fifth Circuit was

well aware of the Perry decision when it wrote its decision in Wells v. Hico Independent School District, supra. This Court is convinced that it is bound in this present case by the analysis of Wells, in our finding that no implied contractual right to work has arisen.

The Court believes that the granting of summary judgment on this issue, the Plaintiff's possessed no property interest in their jobs, disposes of all claims for damages as a matter of law. The Court further believes that this Order disposes of all issues in this case.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Partial Summary Judgment is DENIED, and Defendant's Motion for Summary Judgment is GRANTED as to all issues.

SIGNED and ENTERED this 17th day of September, 1984.

s/
James R. Nowlin
United States District
Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN BATTERTON, ET AL.,
Plaintiffs-Appellants,

v.

THE TEXAS GENERAL LAND OFFICE, ET AL.,
Defendants-Appellees.

No. 84-1961
OPINION

Filed March 3, 1986

Before: Thomas Gibbs Gee, Alvin B. Rubin and W. Eugene Davis, Circuit Judges.

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court
for the Western District of Texas
James R. Nowlin, District Judge, Presiding

SUMMARY

Civil Service/Constitutional Law

Appeal from district court decision that employees of the Texas General Land Office (GLO) did not have a property interest in their jobs under Texas law and that therefore their dismissals from employment did not violate their constitutional rights. Affirmed.

Four employees of the GLO were dismissed after a new Land Commissioner, who claimed a need for reorganization, took office. Asserting a property interest in their jobs, the employees filed suit alleging that they had been fired without procedural due process. After the GLO moved for summary judgment, the employees amended their complaint to add a first amendment claim, which asserted that they had been fired to free positions for the new Land

Commissioner's political supporters. At a hearing for summary judgment, the first amendment claim was ignored by both sides. Finding that the employees did not have a property interest in their jobs under Texas law, the district court granted summary judgment for the GLO and dismissed the complaint. After summary judgment was entered, the employees moved to alter the judgment, noting the existence of their first amendment claim. The GLO retorted that the employees had waived this claim, and the motion was denied.

[1] The due process clause can protect a public employee if state law provides the employee with a property interest in his job. [2] The conditions of employment for GLO employees is set forth in § 31.020, Texas Natural Resources Code, which provides that the employees shall hold their positions "at the pleasure of the commissioner and may be removed by him at any time for satisfactory cause." This section's contradictory phrases create an obvious ambiguity. [3] If an ambiguous statute has been interpreted by executive officers charged with its execution and has subsequently been re-enacted without substantial change, it will continue to receive the same interpretation. Here, § 31.020 has been re-enacted several times, most recently in a 1977 codification. In affidavits, three former chief clerks of the GLO swore that the commissioners under whom they had served uniformly interpreted § 31.020 as granting them the power to fire an employee for any reason. The 1977 codification of § 31.020 therefore transformed the commissioners' existing interpretation of the statute into law, and GLO employees could be fired for any reason. [4] Notwithstanding the foregoing, case law provides that a property right can be based on "mutually explicit understandings," and here the employees assert that GLO practice during their period of employment was to provide adequate notice of planned dismissal and the opportunity to improve one's performance. [5] However, the case holding that an informal understanding may lead to a property interest must be recognized as standing in the absence of an officially promulgated position, and here, § 31.020 is construed as establishing at-will employment.

[6] Under the Federal Rules of Civil Procedure, a party may move for summary judgment without affidavits or other supporting evidence. If such materials are presented, however, the other party has a duty to present factual matter in his defense. In a deposition

and affidavits, the new Land Commissioner asserted that the dismissals stemmed from his honest effort to streamline the GLO; the employees failed to support their claims except with conclusory assertions that the dismissals were politically motivated. [7] The district court did not abuse its discretion in refusing to alter the judgment when the employees belatedly pointed out the first amendment claim.

OPINION

THOMAS GIBBS GEE, Circuit Judge:

Today's case requires us to decide whether the dismissal of four employees of the Texas General Land Office (GLO) violated their constitutional rights. The appellant employees maintain that a Texas statute grants them a property interest in their jobs or, in the alternative, that informal practices within the department do so, as well as that their discharges violated first amendment rights. The trial court entered summary judgment against them, and we affirm.

Appellants were employees of the GLO in January 1983, when appellee Garry Mauro took office as Land Commissioner. Claiming a need for reorganization, Mauro moved swiftly to dismiss employees, discharging the four appellants as of the end of May 1983. Shortly afterwards, they brought a 42 U.S.C. § 1983 action against Mauro and the GLO (hereinafter referred to collectively as Mauro). The original complaint asserted a reasonable expectation of continued employment so long as they satisfactorily performed their duties and that consequently Mauro violated their procedural due process rights by dismissing them without satisfactory cause or a fair hearing. When Mauro moved for summary judgment in July 1984, the employees amended their complaint to add a nebulous first amendment claim—unavailingly, in the event, as the district court entered summary judgment against them on the entire case in September 1984. *See Batterton v. Texas General Land Office*, 592 F. Supp. 372 (W.D. Texas 1984). The employees appeal.

In reviewing the appeal, we first note the conceptual difference between the due process and the first amendment claims. As the Supreme Court has made clear, the two are distinct:

> . . . [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech.

Perry v. Sindermann, 408 U.S. 593, 597 (1972). Separate consideration of the two claims is therefore appropriate.

THE DUE PROCESS CLAIM

[1] The employees assert a property interest in their jobs, invoking the line of Supreme Court cases that began with *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Sindermann*. Considering a teacher's asserted right of continued employment, the *Roth* court refused to base the concept of property on an employee's mere expectation: "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it." 408 U.S. 577. The due process clause can protect a public employee, however, should state law provide the basis of an employee's legitimate claim to entitlement:

> . . . [Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id; see also Bishop v. Wood, 426 U.S. 341, 344-45 (1976). If a property interest exists, procedural due process then accords such rights as those to notice and a hearing before the employee may be fired. We must first see, therefore, whether Texas law provides GLO employees with any legitimate claim of entitlement to their jobs.

[2] The district court accurately labeled § 31.020, Texas Natural Resources Code, as "the center of the maelstrom." 593 F. Supp. at

373. Dealing with the conditions of employment for GLO employees, § 31.020 provides:

> (b) Clerks and employees of the land office shall hold their offices and positions at the pleasure of the commissioner and may be removed by him at any time for satisfactory cause.

Although the parties advance differing interpretations of this provision, the simple truth is that neither we nor anyone else can tell with any real assurance what it was that the Texas legislature intended when it originally enacted this statute over a century ago, in 1879. Obvious ambiguity results from the provision's contradictory phrases: On the one hand, one who holds his jobs "at the pleasure of the commissioner" sounds a great deal like an at-will employee; on the other, dismissal "for satisfactory cause" seems to restrict the commissioner's ability to fire his employees to discharges for cause. We have found no Texas case interpreting the quoted provision, nor does any legislative history exist.

Texas common law, however, provides rules of statutory interpretation, rules that we shall consider in construing § 31.020. Our reference to these is not mandated by *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny; subject-matter jurisdiction today is based on a federal question, not on diversity of citizenship. Reason dictates, however, that in deriving a meaning from the statute's words we should approach them exactly as would a Texas court, since had we discovered an authoritative interpretation by such a court we would have adopted it and since, should any come later, it will of necessity supersede ours. It would make little sense for us to proceed to an aberrant construction by refusing to apply state canons, canons which will in all probability govern any authoritative construction which the statute ever receives. Turning to these, we find them dispositive.

[3] In *Stanford v. Butler*, 142 Tex. 692, ___, 181 S.W.2d 269, 273-74 (1944), the court held that if an ambiguous statute "has been construed by executive officers of the state charged with its execution, and it has subsequently been re-enacted without substantial change in language, it will continue to receive the same construction." Because § 31.020 has been re-enacted several times,

most recently in a 1977 codification, evidence of past commissioners' interpretations becomes crucial. Appellees submitted affidavits of three former chief clerks of the GLO in support of their summary judgment motion. These men, whose combined years of service stretched from 1940 to 1983, all swore that the commissioners under whom they had served uniformly interpreted § 31.020 as granting them the power to fire any employee for any reason. The employees presented no evidence contradicting these affidavits; and while they point to an office policy manual and to current customs, none of these predates the 1977 codification of the statute. *Stanford* therefore teaches us that the 1977 codification of § 31.020 transformed the commissioners' existing interpretation of the statute into law, and that GLO employees can be fired for any reason.

We note that while even standing alone *Stanford* would mandate this conclusion, other rules bolster its force. Texas law, for example, would regard the ambiguity of § 31.020 as requiring an interpretation favorable to the GLO:

> [L]egislative grants of property, rights or privileges must be construed in favor of the state on grounds of public policy and whatever is not unequivocally granted in clear and explicit terms is withheld. Any ambiguity or obscurity in terms of the statute must operate in favor of the state.

State v. Standard, 414 S.W.2d 148, 153 (1967), *quoting Empire Gas & Fuel Co. v. State*, 121 Tex. 138, ___, 47 S.W.2d 265, 272 (1932). Those unpersuaded by the authority of *Stanford* would therefore confront further obstacles to any contrary result.

[4] Our interpretation complete, we must now acknowledge that the letter of state law alone is not necessarily determinative. In *Roth*, the Court held that property interests "are created and their dimensions are defined by existing rules *or understandings* that stem from . . . state law." 408 U.S. at 577. (emphasis added); *see also Sindermann*, 408 U.S. 593 (teacher can have property interest in his job even absent formal contractual tenure provision if an informal understanding with the college administration existed). We have taken our cue from these cases to recognize that a property right might be based on "mutually explicit understandings." *See*,

e.g., Wells v. Hico Independent School District, 736 F.2d 243, 252 (5th Cir. 1984), *cert. dismissed* 196 S.Ct. 11 (1985), *quoting Sindermann*, 408 U.S. at 601. In today's case, the employees introduced affidavits and depositions asserting that GLO practice during their period of employment (from about 1978 to 1983) was to provide adequate notice of planned dismissal and the opportunity to improve one's performance. On appeal, they argue that this practice sufficed to create a legitimate claim of entitlement protected by the fourteenth amendment.

[5] Once § 31.020 is construed as establishing at-will employment, however, cases such as *Sindermann* became readily distinguishable from today's. They are all cases in which no statute resolved whether a property interest in one's job existed. The Supreme Court's holding that an informal understanding may lead to a property interest must therefore be recognized as standing in the absence of an officially promulgated position, one way or the other, on the issue of a teacher's tenure. Here, we have interpreted § 31.020 as establishing a clear and official stand; having done so, we conclude that informal understandings and customs contrary, and subsequent, to the enactment of that statute cannot be the source of an employee's property interest. We reiterate the language of *Roth* that understandings and customs must "stem from . . . state law."[1] 408 U.S. at 577. To say that customs entirely contrary to a statute's meaning may stem from that statute would defy reason; only if consistent with official law may such practices create a property interest in one's job.

Our holding finds support in *Hico Independent School District*. We there ruled that the school district's custom of providing certain grievance and evaluation procedures could not create property interests in the face of Texas law that failed to provide any basis for a claim of entitlement. *See* 736 F.2d at 252-54. Nor are we alone in recognizing such a rule. In *Baden v. Koch*, 638 F.2d 486 (2nd Cir. 1980), for example, considering the assertion that an informal understanding between the mayor of New York and the city's chief

[1]Like *Sindermann*, *Roth* was a case in which no statute was involved. The general scope of its language, however, appears applicable even in cases such as this, in which a statute is the focus of the determination whether due process is owed.

medical examiner prevented the mayor from exercising his statutory authority to fire the examiner at will, the Second Circuit held that a mutual understanding cannot create a property interest contrary to state law. *See id.* at 492-93.

Despite the factual dispute over GLO's practices after 1977, summary judgment was appropriate. Events occurring after 1977 are immaterial in determining whether a constitutional violation occurred. This being so, only the resolution of a legal issue—what § 31.020 means—was required. The district court's interpretation of the provision was proper; we therefore affirm summary judgment as to the employee's claim of a due process violation.

THE FIRST AMENDMENT CLAIM

The employees also contend that the district court improperly entered summary judgment on the entire case because the appellees failed to rebut their first amendment claim. Our review begins with a chronicle of the rather complex procedural history preceding the court's summary judgment order. The employees' original complaint did not contain a first amendment claim. On July 11, 1984, both sides filed motions for summary judgment. Three weeks later, the employees filed an amended complaint containing the first reference to their first amendment rights: an assertion that these were violated because Commissioner Mauro fired the plaintiffs to free positions for his political supporters. After this filing, the appellees continued to press for summary judgment on the entire case, without specific reference to the new claim. In response, the employees neither mentioned the claim again nor presented matter supporting it. At a summary judgment hearing held on September 7, 1984, the first amendment allegation was ignored by both sides. After the district court's entry of summary judgment in the appellees' favor, however, the employees filed a motion to alter or amend judgment, noting the existence of the first amendment claim. Appellees retorted that the employees had waived this claim, and the motion to alter or amend was denied.

[6] Under Fed. R. Civ. P. 56(a) and (b), a party may move for summary judgment without affidavits or other supporting evidence. Should he submit such material, however, Rule 56(e)

imposes upon the other party the duty to present factual matter in his defense:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits and as otherwise provided on this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

The district court believed that the employees were required to present specific facts supporting the first amendment claim to avoid summary judgment. The employees now argue that this belief improperly burdened them with the duty to present specifics. In so arguing, they assume the appellees' failure to address first amendment claim, but while the appellees never referred to the claim explicitly, some of their evidence rebuts the claim. Appellee Mauro asserted in both a deposition and an affidavit that the dismissals stemmed from his honest effort to streamline the GLO, and his statements are bolstered by the affidavits of non-party officials of the GLO and by other documentation. The employees, on the other hand, failed to support their claim except with the following bald and conclusory assertion:

> [T]he purported reorganization of the General Land Office was in fact a pretextual afterthought to justify dismissals in order that Garry Mauro might extend political patronage to friends and supporters by removing existing career employees from the General Land Office in order to free budget funds to pay substantial salaries for those persons he wished to install in positions in the Land Office.

This pronouncement appears, word for word, in the affidavits of three of the appellant employees, but, unsupported by details or other evidence, it does little more than clarify the nebulous first amendment claim in the amended complaint.

The employees' failure to come forward with specifics recalls the decision in *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983). There, appellant Nicolet, Inc. filed a complaint alleging alter ego liability, successorship liability, and contribution or indemnity as three alternative theories of appellee Turner & Newall, Ltd.'s liability. The subsequent procedural disposition of its claim is similar to that here:

> Although the district court's memorandum opinion supporting the grant of summary judgment for T&N discussed only the alter ego liability issue, the order granting summary judgment purported to dispose of Nicolet's entire case against T&N. . . . Our review of the record indicates that Nicolet failed to set forth specific facts raising a genuine triable issue on its theories of successorship liability and contribution or indemnity. Although the complaint refers to both of these grounds of recovery, Nicolet never broached them again until this appeal. Neither Nicolet's brief in opposition to T&N's motion for summary judgment nor its comments at oral argument on the summary judgment motion mentioned a single fact that would trigger a genuine issue on these theories.

Id. at 1163-64. Acknowledging the drastic nature of summary judgment, we nevertheless affirmed its entry in *Hargrave* because of Nicolet's failure to demonstrate an actual dispute over material facts.

[7] *Hargrave* supports affirmance here. While it is true that the employees reminded the district court of the first amendment claim in their motion to alter or amend judgment (thereby distinguishing today's case from *Hargrave*), the court was under no duty to grant that motion. A district court's decision to deny a motion to alter or amend judgment may be reviewed only for an abuse of discretion. *See Weems v. McCloud*, 619 F.2d 1081, 1098 (5th Cir. 1980). To regard the district court's decision as improper would only be to reward the employees' lack of diligence. They had enough time before the summary judgment hearing to unearth any helpful evi-

dence, yet failed to produce anything beyond unembellished assertions that properly belong in a well-pled complaint. We therefore decline to fashion for them any excuse for their failure to comply with the clear requirements of Rule 56(e).

The district court's order of summary judgment is accordingly

AFFIRMED.

A true copy
Test:
Clerk, U. S. Court of Appeals, Fifth Circuit

By _____
Deputy

New Orleans, Louisiana MAY 2 1980

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN BATTERTON, W. STEPHEN MINICK, LINDA D. RAPAVI and G. STEPHEN STUBBS,

Plaintiffs-Appellants,

v.

TEXAS GENERAL LAND OFFICE and GARRY MAURO, Individually and in his official capacity as Commissioner of the General Land Office,

Defendants-Appellees.

No. 84-1961

OPINION

Filed May 12, 1986

Before: Thomas Gibbs Gee, Alvin B. Rubin and W. Eugene Davis, Circuit Judges.

Opinion by Judge Thomas Gibbs Gee;
Dissent by Judge Alvin B. Rubin

Appeal from the United States District Court
for the Western District of Texas
James R. Nowlin, District Judge, Presiding

ON PETITION FOR REHEARING
(Opinion March 3, 1986, 5th Cir. 1986, 783 F.2d 1220)

OPINION

THOMAS GIBBS GEE, Circuit Judge:

As we noted in our opinion, the affidavits of three former chief clerks of the General Land Office agree that from 1940 to 1983 the consistent position of the Land Commissioners under whom they served was that Section 31.020 of the Texas Natural Resources Code and its predecessors empowered the Commissioner to dis-

charge any employee at will. The statute was reinacted in 1977, incorporating that interpretation. *Stanford v. Butler*, 142 Tex. 692, —, 181 S.W.2d 269, 273-74 (1944). A fact issue is made about how it was interpreted thereafter by the affidavit of Steven Minick, which asserts that from 1977 or 1978 a discharge for good cause only was the Commissioner's practice. That he chose to grant the employees, as a matter of grace and practice, more than the law gave them could not confer property rights upon them in the face of Texas law and provides no basis for a claim of entitlement under it. *Wells v. Hico Independent School District*, 736 F.2d 243 (5th Cir. 1984), *cert. dismissed* 196 S.Ct. 11 (1985).

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ALVIN B. RUBIN, Judge, dissenting:

As the application for rehearing now makes clear to me, there is a genuine dispute of material fact in the evidence adduced on the summary judgment motion. I would, therefore, grant the motion for rehearing and remand for further proceedings.

Commissioner Armstrong was in office from 1971 to 1983. The affidavit of Jack Giberson states that, during this entire period, not only from 1971 to 1977 but continued until 1983, Commissioner Armstrong followed a single interpretation of the statute that permitted him to discharge employees at will. If the Commissioner and his predecessors uniformly adopted this interpretation, Texas courts would hold that their interpretation had been approved by the legislature when the statute was reenacted in 1977, as the majority opinion correctly states.

The plaintiffs, however, filed an affidavit by Steven Minick that contradicts Giberson's affidavit as to the period from 1977 or 1978 to 1983. Minick states that during this period the policies and practices of the General Land Office required good cause for termination. Giberson's affidavit and Minick's cannot both be true. Minick's affidavit, therefore, creates a dispute regarding three fac-

tual issues: (1) what was the practice *after* 1977 when the termination took place? (2) if Giberson is correct in saying that the practice was uniform before and after 1977, does Minick's affidavit refute Giberson's version of the pre-1977 interpretation? and (3) did the Commissioner change his interpretation of the statute after 1977?

If, despite re-enactment of the statute, the Commissioner changed his mind and interpreted the statute differently, we may be required to defer to that new interpretation. Agency practice, once established is not frozen in perpetuity: "There is, of course, no rule of administrative *stare decisis*. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view."[1]

The commissioner could not legally adopt an interpretation that was contrary to the legislature's intent or the statute's plain meaning. However, the statute at issue is undeniably ambiguous. The panel has fixed the statute's meaning as affording only employment at will, but it has done so on the basis of the legislature's implicit approval of the Commissioner's pre-1977 interpretation. Such unspoken legislative ratifications are a risky means of determining legislative intent.[2] Given the freedom typically allowed administrative agencies to change their interpretations over time, silent legislative re-enactment is not the sort of clear expression of legislative intent that would make illegal any later deviation in the Commissioner's interpretation. Therefore, even if the Commissioner did not establish a policy of just-cause termination until after 1977, a material issue of disputed fact remains regarding the Commissioner's policy at the time of the plaintiffs' termination.

For these reasons, I respectfully dissent from the refusal to grant rehearing.

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[1] *Bankamerica Corp. v. United States*, ___ U.S. ___, 103 S.Ct. 2266, 2281, 76 L.Ed.2d 456 (1983) (White, J. dissenting); *see NLRB v. Weingarten, Inc.*, 420 U.S. 251, 265-66, 95 S.Ct. 959, 967-68, 43 L.Ed.2d 171 (1975); *Western Coal Traffic League v. United States*, 719 F.2d 772, 778 (5th Cir. 1983) (en banc), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2160. *See also Toyota Motor Sales, U.S.A. Inc. v. United States*, 585 F. Supp. 649, 662 (Ct. Int'l Trade 1984), *aff'd* 753 F.2d 1061 (Fed. Cir. 1985); *see generally* 4 K. Davis, Administrative Law Treatise § 20:11 (1983).

[2] *See, e.g., Mitchell v. C.I.R.*, 300 F.2d 533, 538 (4th Cir. 1962); *Thompson v. Clifford*, 408 F.2d 154, 164-68 (D.C. Cir. 1968).

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Test:
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By _____ Deputy
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